Automotive Battery Industries Sdn Bhd v Phua Cheng Kee

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R2–12–870 OF 2001
FAIZA TAMBY CHIK J
18 JULY 2002

Civil Procedure — Execution — Delay — Whether leave of court needs to be obtained after six years have lapsed — Whether failure to obtain leave a bar to execution of judgment

The plaintiff had obtained a judgment against the defendant for defaulting on its loan repayments. After six years had passed, the plaintiff sought to execute the judgment but the trial judge refused to grant leave. Hence, this appeal.

Held, dismissing the appeal with costs:

(1) Leave of court must be obtained first after six years have lapsed before any enforcement on a final judgment is allowed, as a condition precedent. The plaintiff's failure to obtain leave to execute under O 31 r 2(1)(a) of the Subordinate Court Rules 1980 ('the SCR') upon the lapsing of the six years' period would be a bar to execute or enforce the said judgment (see para 2).

(2) The plaintiff in no uncertain terms had been reserving its rights to enforce the full balance judgment sum against the defendant. Until the plaintiff proves that there was a gross error in the application of the law on the facts hereof, the trial judge's exercise of judicial discretion in the court below would not be interfered with (see para 13).

[**Bahasa Malaysia summary**

Plaintif telah mendapatkan satu penghakiman terhadap defendan kerana gagal menyelesaikan pembayaran pinjamannya. Selepas enam tahun, plaintif memohon untuk menyempurnakan penghakiman tersebut akan tetapi hakim bicara enggan memberi kebenaran kepadanya. Maka, rayuan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Kebenaran mahkamah harus didapatkan terlebih dahulu selepas enam tahun berlalu sebelum penyempurnaan penghakiman akhir boleh dibenarkan, sebagai syarat terdahulu. Kegagalan plaintif untuk mendapatkan kebenaran untuk penyempurnaan di bawah A 31 k 2(1)(a) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') selepas berlalunya tempoh enam tahun menjadi penghalang untuk menyempurnakan atau menguatkuasakan penghakiman tersebut (lihat perenggan 2).

(2) Plaintif tanpa apa-apa keraguan telah melengahkan haknya untuk menguatkuasakan penghakiman untuk baki sepenuhnya terhadap defendan. Sehingga plaintif membuktikan bahawa terdapat kekhilafan besar dalam pemakaian undang-undang atas fakta-fakta berkenaan, pelaksanaan budi bicara hakim bicara di mahkamah di bawah disahkan (lihat perenggan 13).]

Notes

For cases on delay in executing judgments, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) para 2265

Cases referred to

Evans v Bartlam [1937] AC 473 PC (refd)
Krakauer v Katz [1954] All ER 244 (refd)
Malayan Banking Bhd v Zainon bt Ismail (unreported, OS No 24-251-2000) (refd)
Re Haji Ahmad b Lazim & Ors; ex-p Bank Kerjasama Rakyat (M) Bhd [1999] 5 MLJ 478 (refd)
Tg Iskandar Tg Ahmad v Sime Bank Bhd [2001] 7 CLJ 560
Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd [1989] 3 MLJ 508 (refd)

Legislation referred to

Civil Law Act 1956 s 3(1)(a)
Limitation Act 1953 s 6(3)
Rules of the High Court 1980 O 3 r 6, O 45 r 2(1)(a)
Subordinate Court Rules 1980 O 31 r 2(1)(a)

Daniel Siew (Chung, Chan & Hasnal) for the plaintiff/appellant
KL Wong (KL Wong & Lim) for the defendant/respondent

Faiza Tamby Chik J:

[1] The Plaintiff's Notice of Application is based on the mandatory requirement as set out vide O 31 r 2(1)(a) of the Subordinate Courts Rules 1980 ('the SCR') (O 45 r 2(1)(a) of the Rules of the High Court 1980) stating:

> A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases that is to say:
>
> (a) where six years or more have lapsed since the date of the judgment or order;

[2] It is noted that since the time of the Defendant's default in making any further instalment payment thereto (30 September 1995), the Plaintiff had been threatening to issue bankruptcy proceedings until 1997. It is also noted that 'leave to execute' is not to be granted as of right under O 31 r 2(1) of the SCR and I think that leave of the court must be obtained first, after six years have lapsed, before any enforcement on a final judgment be allowed, as a condition precedent.

[3] Edgar Joseph Jr (as he then was) in *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508 stated at p 510:

> The cases of *Re Ide & Re Woodaall* have stood unchallenged for more than 100 years and I take it that they represent the law on the point concerned.
>
> To my mind, it is not an unfair summary of the position in the UK to say that a creditor can issue a bankruptcy notice only when he has obtained a final

judgment or a final order, the judgment or order must be one on which the creditor is in a position to issue execution so that if execution cannot be issued at all, no bankruptcy notice can be issued. If the execution can be issued only with leave of the court, the creditor must obtain such leave before he can issue a bankruptcy notice.

[4] Clement Skinner JC (as he then was) in *Re Haji Ahmad b Lazim & Ors; ex p Bank Kerjasama Rakyat (M) Bhd* [1999] 5 MLJ 478 decided at p 479:

Held: (3) If more than six years have elapsed since a judgment is obtained and leave had not been obtained to execute that judgment, the judgment creditor cannot be described as being in a position to issue execution on the judgment. If execution can be issued only with leave of the court, such leave must be obtained before a bankruptcy notice can be issued thereon. Since the respondent has not been able to show that they were in a position to issue execution on their judgment when they issued the present bankruptcy notice, the notice was therefore irregularly issued (see 488I–489I).

(4) The irregularity in this case has resulted in the present bankruptcy notice being issued and served on the appellants when it should not have been issued in the first place. The sufferance of such an act is a matter of substantial injustice to the appellants which cannot be remedied by any order of court short of an order invalidating the bankruptcy notice by setting it aside. In accordance with r 98 of the Bankruptcy Rules 1969, it was held that no act of bankruptcy has been committed by the appellants under the present bankruptcy notice (see p 490F–H).

[5] Suriyadi J in *Tg Iskandar Tg Ahmad v Sime Bank Bhd* [2001] 7 CLJ 560 held:

Held: (1) Bankruptcy actions do fall within the ambit of O 45 r 2(l)(a) of the RHC, as there were no terms, provisions or cogent reasons that excluded bankruptcy proceedings from being covered by this provision. Therefore, if more than six years have lapsed since the date of final judgment or order, any act to issue a writ of execution must require the court's leave. In the current appeal, the JC filed the bankruptcy notice without first obtaining that prerequisite leave. Hence, the bankruptcy notice was bad and the petition was equally incompetent, (pp 563G, 564B, 567C).

[6] In summary, I think the Plaintiff, in failing to obtain leave to execute under O 31 r 2(1)(a) upon the lapsing of the six years' period, will forever be barred from executing or enforcing the said judgment in any manner whatsoever.

[7] A question now arises as to what are the circumstances which govern the court's exercise of its discretion under O 31 r 2(1)(a) of the SCR? Lord Denning's obiter dictum in *Krakauer v Katz* [1954] All ER 244 stated:

I am disposed to agree that, by analogy with the Limitation Act 1939, if a Plaintiff allows an action to go to sleep for six years, the court in its discretion will usually dismiss the case for want of prosecution, unless the Plaintiff can show some good reason why he should be allowed to go on with it.

[8] Section 3(1)(a) of the Civil Law Act 1956 states:

3. Application of UK common law, rules of equity and certain statutes.

(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall –

(a) in West Malaysia or any part thereof, apply common law of England and the rules of equity as administered in England on the 7th day of April 1956.

[9] In this case, it is apparent that there are two time-bar limitation periods applicable:

(i) Section 6(3) of the Limitation Act 1953, which is an absolute time-bar against enforcement of any judgment debt upon twelve (12) years elapsing with an additional requirement of barring recovery of interest-arrears on judgment debts upon expiry six (6) years only;

(ii) Order 31 r 2(1)(a) of the SCR (O 46 r 2(1)(a) of the Rules of the High Court 1980) which is a qualified time-bar against such enforcement of judgment debts meaning, 'you are barred, unless, you can show cogent reasons to the court that you can proceed further on, despite the fact that six years have elapsed'.

[10] In the unreported case of *Malayan Banking Bhd v Zainon bt Ismail* (unreported, OS No 24-251-2000), the learned Judge refused to allow the Bank's application for an order for sale to proceed, albeit ex parte and uncontested by the Defendant with preliminary objections raised thereto, on account of infringement of the principle enunciated by Lord Denning in *Krakauer v Katz* for having allowed the matter to go to sleep for ten years (more than six years).

[11] The learned Judge cited the Plaintiff's negligence in failing to proceed as follows:

(i) procrastinated in filing the matter at the High Court;

(ii) failed to issue a notice of intention to proceed under O 3 r 6, and hence dismissed the Bank's application to proceed with its foreclosure proceedings summarily.

[12] In this instant case, judgment was entered for RM70,000 payable in RM400 per month instalments wef 30 August 1994 – 31 December 1994 and thereafter RM500 per month wef 31 January 1995 – full settlement. The usual default clause was incorporated, that in the event of any one instalment being in default, the whole would become due and payable. Looking at Exhibit 'B' it is quire clear that the Defendant had already defaulted in the first monthly instalment which was stated in the judgment to be due and payable on 30 August 1994 for the Plaintiff received its first instalment of RM400 only on 27 September 1994, a delay of about a month. In such circumstances, it is clear from the terms of the Judgment of 12 August 1994, that the Plaintiff, as at September 1994, had already been vested with the right under the judgment to execute thereon for the full sum. The reasons cited by the Plaintiff for having failed to take action to execute the judgment were essentially based on the Defendant asking for time to pay and the Plaintiff's good relations with the Defendant's brother. But these two reasons cannot be cogent reasons to justify the Plaintiffs gross 'laches' in a delay of six years over its first time-bar limitation. The

Plaintiff's reminder demand letters dated 30 November 1995 and 13 June 1996 respectively, stated:

> ... kindly update your payment to us within seven (7) days from the date of this letter, failure of which we shall have no alternative but to enforce the judgment accord to us and proceed with bankruptcy against you.

And

> ... please update your payment to us within 14 days ... failure of which we shall enforce the judgment accorded to us.

[13] Hence, as from November 1995, the Plaintiff in no uncertain terms had been reserving its rights to enforce the full balance judgment sum against the Defendant. I am of the view that until the Plaintiff has shown to this Court that there is a gross error in the application of the law on the facts hereof, this Court cannot interfere in the trial judge's exercise of judicial discretion in the court below. The basic principle is stated in *Evans v Bartlam* [1937] AC 473, HL, where Lord Atkins reiterated:

> ... as the Lord Justice said, the Court of Appeal 'has no power to interfere with his exercise of discretion unless we think that he acted upon some wrong principle of law' ... and, while the Appellate Court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it ...

[14] On this premise I come to the conclusion that the learned Judge at first instance had exercised his discretion correctly on the principle in *Evans v Bartlam* [1937] AC 473, HL. The Appeal is hereby dismissed with costs.

Appeal dismissed with costs.

Reported by AG Kalidas